RESERVED

Civil Writ Petition no. 1239 (M/S) of 2002

Manish Kumar ---------- Petitioner

Versus

Jai Prakash Kothari & ors. Respondents

Hon'ble M.M. Ghildiyal J.

By means of this petition under Article 227 of the Constitution of India the petitioner has prayed for quashing of order dated 24.09.2002 passed by the District Judge, Tehri Garhwal.

The facts of the case are that the plaintiff-petitioner filed a suit before Civil Judge (Senior Division) Tehri Garhwal for perpetual injunction against the defendants-respondents restraining them from making any further construction and for removal of existing constructions over the roof of the shop in pursuant to the resolution no.9 dated 22.10.2001of Nagar Panchayat, Muni-Ki-Reti, district Tehri Garhwal. According to the petitioner he was granted permission to construct his shop at parking stand Muni-Ki-Reti on some premium and Rs.300/- per month as rent by the Nagar Panchayat Muni-Ki-Reti by rent-note dated 8.3.2001.

The petitioner constructed a shop and is running garment business therein. On 29.5.2001 the petitioner applied to defendant-respondent to grant lease of the roof so that he may construct another shop over the roof but instead of granting permission to the petitioner Nagar Panchayat granted lease to respondent no.1 of the present petition. The petitioner further alleged that the respondent no.1 started construction over the roof and after constructing walls cement- slab roof has been laid on it, which has resulted in cracks in the shop of the petitioner. As application for interim injunction was also filed and the learned trial court vide order dated 10.6.2002 granted injunction in favour of the petitioner directing respondent no.1 not to make any construction over the roof of the petitioner's shop during the pendency of the suit.

Aggrieved from the order of the Civil Judge (Senior Division) Tehri Garhwal respondent no.1 preferred appeal no. 12 of 2002 before the District Judge, Tehri and also moved an application for staying the order dated

16.8.2002 passed by the Civil Judge (Senior Division) in original suit no.82 of 2001. The appellate court after hearing both the parties and after perusal of record vide impugned order dated 24.9.2002 allowed the application of respondent no.1 and permitted him to complete the construction so to make it a running shop as per agreement with the Nagar Panchayat with a rider that the order shall be subject to the decision of appeal and in case the appeal is dismissed the respondent no.1 will have to remove the construction at his own costs.

Heard Sri Alok Singh learned counsel for the petitioner and Sri J.P.Joshi learned counsel for respondent no.1

Learned counsel for the petitioner has submitted that the appeal before learned District Judge was under Order XLIII of the Code of Civil Procedure (for the short 'C.P.C.') and not under Order XLI and as such the learned District Judge has exceeded his jurisdiction in allowing the application for interim order of respondent no.1 and permitting him to make constructions. He has further submitted that the learned District Judge has passed a detailed order while allowing the application of respondent no.1 for interim stay and instead allowing the application should have decided the appeal itself. Learned counsel for the petitioner has further submitted that the appellate court has passed order ignoring section 94 (e) C.P.C. Section 94 (e) is reproduced as under:-

" make such other interlocutory orders as may appear to the court to be just and convenient."

He has further relied upon the judgment of Apex Court in the case of **Wander Ltd. Vs. Antox India Pvt. Ltd, reported in 1991 (9) Lucknow Civil Decisions page 290 in** which the Apex court in paragraph no.14 has held as under:-

> " The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. In appeal against exercise of discretion in said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material.

> The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion."

This authority will not help the petitioner. In the aforesaid case the Apex Court help that the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principal of law regulation grant or refusal of interlocutory injunctions.

Learned counsel for the respondent has submitted that the learned trial court has exercised his jurisdiction arbitrarily and has given findings, which are perverse. In the plaint it has been stated that in the rent not the Nagar Panchayat has retained the possession of the roof of the shop in dispute. The plaintiff has further submitted that the respondent no.1 has constructed wall over the roof and has laid cement slabs. Thus, it is admitted case of the plaintiff-petitioner that he was not in possession of the roof and further the construction has been done by respondent no.1. While granting injunction the court must follow the principles laid down for grant of injunction. Neither the petitioner is in possession nor he will suffer any irreparable loss. Further the balance of convenience is also in favour of respondent no.1. He has further stated that he was already paid Rs. 50,000.00 to the Nagar Panchayat as per agreement and as such he will suffer irreparable loss if he is not permitted to make the shop in a position to run his business in the shop in dispute.

Learned counsel for respondent has placed reliance on the judgment of **Essen Deinki Versus Rajiv Kumar,reported in (2002) 8 Supreme Court Cases 400** wherein the Apex Court has held that interference with the findings of fact is not permissible under Article 227 of the Constitution of India unless finding is perverse or not based on any material whatsoever and causes manifest injustice. This case relates to Article 227 of the Constitution of India. However, the principle laid down in the aforesaid case

will also be applicable in the appeal and where the appellate court comes to the conclusion that the finding given by the trial court is perverse and is not based on any material. The appellate court can interfere with the finding of fact.

Learned counsel for the respondent has further placed reliance on the judgment of **Ouseph Mathai and others Versus M.Abdul Khadir, reported in (2002) 1 Supreme Court Cases 319** wherein the Apex Court has held that the stay granted by the court does not confer a right upon a party and is always granted subject to the final outcome of the case and at the risk and costs of the party in whose favour it is awarded. I agree with the learned counsel for the respondent. The learned District Judge while granting stay has put a rider that the order shall be subject to the decision of appeal and in case the appeal is dismissed the respondent no.1 will have to remove the construction at his own costs. So no irreparable loss will be caused to the plaintiff-petitioner.

Learned counsel for the respondent has drawn my attention to the prayer in the plaint. The plaintiff has prayed to issue mandatory injunction against defendant to cancel the allotment of roof to the respondent no.1. The second prayer of the plaintiff is to issue permanent injunction to respondent no.1 not to make further construction over the roof of the shop in dispute. The plaintiff has further prayed that the mandatory injunction be granted to remove the construction already made by respondent no.1 over the roof of the shop in dispute. Thus, from the plaint as well as from the relief part of the plaint, it is clear that neither the roof was allotted to the petitioner nor he is in possession of the roof and further the construction has already been made by respondent no.1.

Admittedly the Nagar Panchayat is the landlord of the roof in question. By a resolution Nagar Panchayat has allotted the roof on certain conditions such as premium of Rs.50, 000.00 and a rent of Rs.200.00 per month. Respondent no.1 has already deposited the amount as per agreement. As per paragraph no.13 of the plaint two sides of the walls have already been completed and cement slabs have already been raised over it. As such in the circumstances, to restrain the respondent no.1 from making the newly constructed shop into a running shop will jeopardize the interest of respondent no.1. In fact, the plaintiff too had applied to the Nagar Panchayat

for possession of roof so that he may construct a shop over it. Nagar Panchayat refused the permission to the petitioner. I find no illegality in the order passed by the District Judge, Tehri.

However the observations made in this judgment relating to the grant or refusal of injunction will not affect the merit of the appeal/suit.

For the reasons stated above the writ petition is dismissed. No order to costs.

(M.M. Ghildiyal, J.)

April 19, 2003
MPS